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ABSTRACT

This chapter provides an analysis of seniority rights under Title VII of the Civil Rights Act of 1964, which bars discrimination in employment. Two legal theories have arisen in assessing Title VII claims: discriminatory treatment, in which the burden of proof of discriminatory intent lies with the plaintiff, and discriminatory impact of neutral practices, in which the burden shifts to the employer to prove that the practice in question is a legitimate business necessity. Because Title VI insulates seniority systems from disparate impact suits, Title VII litigation focuses on what constitutes a bona fide seniority system and scope of immunity. The question addressed in the ensuing discussion is therefore as follows: under what circumstances must seniority adjustments be made, and how much discretion do employers have in modifying operation of seniority systems to give preference to women and minorities? Cases in which the judiciary has addressed these and related Title VII issues are analyzed under the following headings: (1) retroactive seniority (for employees previously denied employment in the same firm for discriminatory reasons); (2) bona fide status (covering legal definitions of bona fide seniority systems); and (3) affirmative action plans (to remedy the adverse effects of seniority systems on victims of prior discriminatory employment practices). The concluding section alludes to counterclaims of reverse discrimination arising from modification of seniority systems to give preference to women and minorities. (TE)

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Seniority Rights and Title VII

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Seniority credit is increasingly important in the nation's work force. Unlike other criteria used to award job benefits, such as merit ratings, the primary feature of seniority systems "is that preferential treatment is dispensed on the basis of some measure of time served in employment."¹ The principle of seniority often is used to calculate fringe benefits such as vacation time and eligibility for insurance and retirement programs. More significantly, seniority frequently is used to establish priority lists for promotions, special training programs, and other job opportunities and to determine the order of personnel layoffs and recall privileges (competitive seniority). Seniority provisions are the focus of substantial attention at the bargaining table, and no aspect of collective bargaining agreements has a greater impact on the economic security of individual employees. The Supreme Court has recognized that "competitive status" seniority "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job."²

During the past two decades, seniority rights have been the source of a large volume of employment discrimination litigation. Victims of discriminatory hiring and promotion practices have sought seniority adjustments and have challenged the legality of neutral seniority

1. *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980).

2. *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). See B. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962).

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systems that allegedly perpetuate the adverse effects of past discriminatory practices. Also, alterations in the application of seniority provisions to give preference to women and minorities have resulted in charges of "reverse discrimination." Suits have focused on the equal protection clause of the fourteenth amendment and Title VI and Title VII of the Civil Rights Act of 1964. Because of the breadth and complexity of the legal issues, this chapter is limited to an analysis of seniority rights under Title VII.

LEGAL CONTEXT

Title VII, as amended in 1972, bars discrimination in public and private employment on the basis of race, color, sex, national origin, and religion and covers hiring, promotion, compensation, fringe benefits, and other conditions of employment. Title VII claimants must meet certain procedural requirements in filing charges and must pursue appropriate state and federal administrative remedies before initiating a federal lawsuit.³ When judicial review is properly evoked, the federal court has two primary tasks. It must first determine whether Title VII's provisions have been violated, and if so, it must then fashion appropriate relief. Seniority rights have been at issue in both phases of Title VII litigation.

Two legal theories have been judicially developed for use in assessing Title VII claims. In suits alleging that an employee has received discriminatory *treatment*, the employer's unlawful motives must be proven. An employer can rebut an inference or *prima facie* case of disparate treatment by articulating a nondiscriminatory reason for the employment action. The plaintiff retains the burden of proving that the asserted nondiscriminatory reasons are mere pretexts to mask intentional discrimination. In contrast, where neutral practices are challenged as having a disparate *impact* on members of protected groups, proof of intentional discrimination is not required. After a *prima facie* case

3. For example, in states with state or local remedies for discriminatory employment practices, an individual cannot file charges with the Equal Employment Opportunity Commission (EEOC) until 60 days after state proceedings have been initiated, unless such proceedings have been earlier terminated. A claim must be filed with EEOC within 180 days of the alleged discriminatory act or within 300 days if the claim has been filed with a state or local agency. If the EEOC has not dismissed the charges, filed a civil action, or entered into a conciliation agreement within 180 days of the charge being filed, the individual must be given notice that within 90 days a civil action may be initiated. 42 U.S.C. § 2000e-5. The United States Supreme Court has ruled that the statutory time limitation for filing Title VII charges is not a jurisdictional prerequisite to a federal court action, but is subject to waiver, estoppel, and equitable tolling "to honor the remedial purpose of the legislation as a whole." *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127, 1135 (1982).

of discriminatory impact is established, the burden shifts to the employer to prove that the contested practice is a legitimate business necessity.⁴

Title VI insulates seniority systems from disparate impact suits to the extent that employers are allowed to "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system" as long as intentional discrimination is not involved.⁵ Substantial Title VII litigation has focused on what constitutes a bona fide seniority system and the scope of immunity provided to such systems under Title VII.

Once a Title VII violation is established, federal courts are empowered with broad authority to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."⁶ However, Title VII stipulates that nothing contained in the law "shall be interpreted to require any employer . . . to grant preferential treatment" based on race to remedy a de facto racial imbalance in the employer's work force.⁷ Sensitive questions have arisen over the nature of equitable relief (*e.g.*, retroactive seniority; hiring, promotion, and layoff quotas) necessary to compensate for prior discrimination. Under what circumstances must seniority adjustments be made and how much discretion do employers have in modifying the operation of seniority systems to give preference to women and/or minorities? Cases in which the judiciary has addressed these and related Title VII issues are analyzed in the following sections.

RETROACTIVE SENIORITY

Seniority rights often have become the focus of controversy after an employer has been found guilty of employment discrimination under Title VII. Plaintiffs, who have been victims of discriminatory hiring and promotion practices, have sought retroactive or constructive seniority to restore them to their proper place in relation to other employees.

In a significant 1976 decision, *Franks v. Bowman Transportation Company*, the Supreme Court held that minority plaintiffs who were denied employment because of race after the effective date of Title VII

4. For a discussion of these standards, see M. McCARTHY, DISCRIMINATION IN EMPLOYMENT: THE EVOLVING LAW (NOLPE Monograph 1983), at 3-7.

5. 42 U.S.C. § 2000e-2(h).

6. 42 U.S.C. § 2000e-5(g).

7. 42 U.S.C. § 2000e-2(j).

were entitled to priority hiring with retroactive seniority to the date of their rejected applications.⁸ The Court did not order the employer to modify its negotiated seniority system, but rather to award seniority that the plaintiffs should have earned to make them "whole." Without retroactive seniority for the unlawful refusal to hire, the majority reasoned that the plaintiffs could never obtain their rightful place in the seniority hierarchy. The burden was placed on the company to prove that individuals who reapplied for the jobs in question had not been victims of the discriminatory hiring practice. Despite the dissenting Justices' concern that "the economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers,"⁹ the majority concluded that with respect to competitive status benefits, it is "presumptively necessary" for the burden of prior racial discrimination to be "divided among discriminatee and nondiscriminatee."¹⁰

In the latter 1960s and early 1970s several federal appellate courts awarded retroactive seniority to individuals where neutral seniority systems perpetuated discrimination even though the discriminatory practices occurred prior to the effective date of Title VII.¹¹ These courts reasoned that "Congress did not intend to freeze an entire

8. 424 U.S. 747 (1976). The majority reasoned that "if relief under Title VII can be denied merely because the majority group of employees who have not suffered discrimination will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed," *id.* at 775, citing *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971). See also *Freeze v. Aro, Inc.*, 503 F. Supp. 1045, 1048 (E.D. Tenn. 1980), in which the federal district court recognized that despite the conflict between the award of increased seniority rights to one employee and the economic interests of other employees, it is reasonable for persons "innocent of wrongdoing to bear some burden" to compensate for past discrimination.

9. *Id.*, 424 U.S. at 789 (Powell, J., dissenting). Chief Justice Burger would have preferred a monetary award (front pay) for discrimination victims rather than an award of retroactive seniority which disadvantages innocent employees instead of the employer, *id.* at 780-731 (Burger, C. J., concurring in part, dissenting in part).

10. *Id.* at 777. The majority reasoned that the relief ordered achieved an appropriate middle ground between the status quo and "complete relief" which would deprive non-discriminatees of seniority obtained because of illegal discrimination against minorities.

11. See, e.g., *Nance v. Union Carbide Corp.*, 540 F.2d 718 (4th Cir. 1976), *cert. denied*, 431 U.S. 953 (1977); *Sabala v. Western Gilette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *vacated and remanded*, 431 U.S. 951 (1977); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *summarily vacated and remanded*, 423 U.S. 809 (1975); *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975); *Johnson v. Goodyear Tire and Rubber Co.*, 461 F.2d 1364 (5th Cir. 1974); *United States v. Chesapeake and Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom.*, *Railroad Trainmen v. United States*, 411 U.S. 939 (1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); *United States v. Sheet Metal Workers, Int.*, 416 F.2d 123 (8th Cir. 1969).

generation of Negro employees into discriminatory patterns that existed before the Act."¹² In 1974 the Fifth Circuit Court of Appeals declared that "[t]he principle of the illegality of a facially neutral seniority system superimposed on a history of employment discrimination is so well settled that extended discussion is unnecessary."¹³

However, in 1977 the Supreme Court ruled in *Teamsters v. United States* that a bona fide seniority system does not become unlawful simply because it operates to "freeze" the adverse impact of pre-Title VII discrimination.¹⁴ The Court reasoned that the seniority system at issue was negotiated and maintained free from any discriminatory intent, even though it perpetuated an advantage given to white employees who had accumulated greater seniority than minority employees who were victims of pre-Act discrimination in a particular job category. The majority concluded that "the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to passage of the Act."¹⁵

While barring relief for minority applicants who suffered only pre-Act discrimination, the majority agreed with the lower courts that victims of post-Act discrimination were entitled to seniority adjustments. Finding a discriminatory hiring pattern and practice in a specific job category, the Court reasoned that minorities who had applied for the jobs were presumptively entitled to be "made whole," unless the company could substantiate that its post-Act refusal to place a given minority applicant in such a position was not based on its discriminatory

12. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968).

13. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974).

14. 431 U.S. 324, 350 (1977). In a separate opinion Justice Marshall cited over 30 federal appellate decisions supporting his conclusion that Congress did not intend to legalize seniority systems that perpetuate either pre- or post-Act discrimination. *Id.* at 378-379 (Marshall, J., concurring in part, dissenting in part).

15. *Id.* at 353. The same term the Supreme Court found no Title VII violation in an employer's failure to credit the petitioner with retroactive seniority to the date she was discharged under a discriminatory policy in 1968. The majority reasoned that the discharge was not challenged in a timely fashion, and that the petitioner had not been discriminated against in the calculation of seniority since she was rehired in 1972. In essence, the Court concluded that a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977). Also in 1977 the Supreme Court held that an employer was not obligated under Title VII to disregard a bona fide seniority system, contained in the collective bargaining agreement, to accommodate the religious practices of an employee: "The strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, n.12 (1977).

policy.¹⁶ The Court majority further reasoned that employees who had not submitted futile applications for the jobs in question were not barred from an award of retroactive seniority if they could carry the difficult burden of proving that they would have applied for the positions *but for* the company's discriminatory policies: "The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination."¹⁷ However, the majority reasoned that such retroactive seniority could not be given to a date earlier than the Act's effective date.

The United States Supreme Court recently affirmed a decision in which the Second Circuit Court of Appeals ordered seniority adjustments for victims of an employment practice that locked in a discriminatory method of making hiring decisions (in contrast to locking in the *effects* of pre-Title VII discrimination).¹⁸ The appeals court recognized that under *Teamsters*, a meritorious Title VII claim against a municipality requires a discriminatory act after March 24, 1972,¹⁹ rather than a prior act whose effects are perpetuated through a facially neutral seniority system. The court found that after 1972 the City of New York conditioned employment eligibility on scores on tests which were not validated as job-related and had a disparate impact on blacks and hispanics. This practice was considered to be a continuing policy of discrimination which ended only when the last person was hired off the lists. The court reasoned that since the charge was timely filed within 300 days of the last discriminatory act, minority employees who had suffered from the discriminatory hiring practice since 1972 were entitled to back pay and retroactive seniority.²⁰

16. 431 U.S. at 356-376.

17. *Id.* at 367. See also *Association Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

18. *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983). This case also involved a request for relief under Title VI which prohibits discrimination against persons on the basis of race, color, or national origin in programs or activities receiving federal funds. The Supreme Court affirmed the appeals court's ruling that discriminatory intent is not essential to establish a Title VI violation but that a private plaintiff can recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI.

19. Before the 1972 amendments to Title VII, the Act did not apply to public employers.

20. In *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978), the Second Circuit Court of Appeals also ruled that in challenging a continuous discriminatory policy, the charge need only be made within the statutory limitation following the last occurrence of discrimination. But see *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), in which the Third Circuit Court of Appeals ruled that the use of a hiring list compiled from the results of a discriminatory test given to job applicants did not constitute a continuing violation of Title VII. The Title VII claim was dismissed because the charge was not filed with EEOC within 180 days of the creation of the list.

However, employers can reduce their liability for hiring discrimination by offering a Title VII claimant the job previously sought, even though the offer does not include the promise of retroactive seniority. In 1982, the Supreme Court ruled in a six-to-three decision that a company's liability for hiring discrimination ended when it made an unconditional job offer to individuals who allegedly had been denied employment for discriminatory reasons.²¹ The Court majority concluded that such tolling of the accrual of back pay liability "serves the objectives of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant."²² The Fourth Circuit Court of Appeals had found that the company's job offer without the promise of retroactive seniority was "incomplete and unacceptable," and thus did not curtail the accrual of liability.²³ But the Supreme Court majority held that the appellate court's position, which was championed by the Equal Employment Opportunity Commission (EEOC), discouraged employers from remedying discriminatory acts before being judicially required to do so, because hiring a Title VII claimant would be more costly than hiring other applicants for the same job. The majority noted that if claimants accept unconditional job offers while litigation is in progress, they still retain their right to receive full compensation, including retroactive seniority, if they prevail in their Title VII suits.

BONA FIDE STATUS

Because bona fide seniority systems that lock in the effects of pre-Title VII discrimination are not unlawful, an assessment of whether a given system is bona fide is crucial in determining whether seniority adjustments are required to compensate for the system's disparate impact. In 1977, the Fifth Circuit Court of Appeals summarized the criteria that should be used in determining whether a seniority system is bona fide: (1) it must be neutral in that transfers between seniority units affect all employees equally; (2) it must be rational in that it is designed in accordance with common practices in the industry; (3) its genesis must not be grounded in discrimination; and (4) it must not be maintained for an illegal purpose. The court noted that the four factors

21. *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 645 F.2d 183 (4th Cir. 1981), *rev'd and remanded*, 102 S. Ct. 3057 (1982).

22. *Id.*, 102 S. Ct. at 3064. Justice Blackmun admonished the majority for providing employers with a "unilateral device" to cut off back pay liability by making "cheap offers" that plaintiffs cannot reasonably be expected to accept. *Id.* at 3071, 3075 (Blackmun, J., dissenting).

23. 645 F.2d at 193.

are focal points for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system" which is "integral to a determination that the system is or is not bona fide."²⁴ Based on evidence that the seniority system at issue was adopted when job segregation was standard operating procedure and was maintained in part to discourage black workers from transferring into specific bargaining units, the court found that the system was not bona fide. The court noted that black employees were forced to "commit seniority suicide" to enter departments from which they were previously excluded unlawfully because of race.

Two years earlier, however, the same court upheld a seniority system as bona fide under Title VII because the long-established system had been adopted without any intent to discriminate.²⁵ Noting that the employer's hiring practices had been nondiscriminatory for over ten years and that individual employees who were laid off under the system had not themselves been victims of prior employment discrimination, the court held that the use of seniority in determining layoffs was not unlawful despite more blacks than whites being discharged. The court endorsed the use of a "last-hired—first hired" policy for reducing personnel even if it resulted in the elimination of blacks from the company's work force. The Third Circuit Court of Appeals similarly found that a company's collective bargaining agreement, stipulating that personnel would be reduced on the basis of reverse seniority, did not unlawfully frustrate the objective of increasing the percentages of female and minority employees through affirmative action in hiring.²⁶ The court reasoned that in spite of the disparate impact of seniority-based layoffs on women and minorities, the practice was not subject to Title VII attack without evidence of discriminatory intent. In 1979 an Alabama federal district court also upheld a seniority system as bona fide because an assessment of the "totality of the circumstances" indicated that purposeful discrimination was not involved, even though the system did not satisfy one of the four criteria described previously.²⁷

In several Title VII cases, courts have been called on to determine whether specific employment practices are part of bona fide seniority

24. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350-352 (5th Cir. 1977). See also *Teamsters v. United States*, 431 U.S. 324, 355-356 (1977).

25. *Watkins v. United Steel Workers of America, Local No. 2369 v. Continental Can Co.*, 516 F.2d 41 (5th Cir. 1975).

26. *Jersey Central Power and Light Co. v. Local Unions of the Int'l Bhd. of Elec. Workers*, 508 F.2d 687 (3d Cir. 1975).

27. *Faulkner v. Republic Steel Co.*, 30 FEP Cases 555, 563 (N.D. Ala. 1979).

systems and thus immunized from disparate impact suits. The Ninth Circuit Court of Appeals found that an employer's criteria for distinguishing between temporary and permanent employees (a temporary employee must work at least 45 weeks in a single calendar year before becoming a permanent employee) was not part of a bona fide seniority system; therefore, plaintiffs could establish a Title VII violation by proving that the policy had a disparate impact on minorities.²⁸ The appeals court found the rule to be a classification device for determining who attains permanent status, noting its susceptibility to discriminatory application because disfavored employees could repeatedly be laid off prior to attaining 45 weeks of service in a year. However, in 1980 the Supreme Court reversed the decision, concluding that the 45-week requirement, which focuses on length of employment and establishes a threshold standard for entry into the permanent employee seniority track, is a component of a seniority system within the meaning of Title VII.²⁹ The case was remanded to give the plaintiffs an opportunity to establish that the seniority system is not bona fide in that it is grounded in intentional discrimination.

More recently, the Supreme Court ruled in *American Tobacco Company v. Patterson* that several lines of progression for job advancement with a disparate impact on women and minorities constituted a bona fide seniority system that was not vulnerable to being invalidated under Title VII without evidence of discriminatory intent.³⁰ The Fourth Circuit Court of Appeals had reasoned that even if the job progression lines were part of a seniority system, the practice was subject to a disparate impact suit because of its post-Act adoption.³¹ Applying this logic, the appeals court had found a Title VII violation because the use of the progression lines was not justified as a business necessity. Disagreeing, the five member Supreme Court majority concluded that proof of discriminatory intent is necessary to invalidate either pre- or post-Title VII seniority systems. The majority noted that if post-Act seniority systems were subjected to disparate impact suits, employers would be discouraged from modifying their pre-Act systems to make them more equitable.

Three of the dissenting justices in *American Tobacco* argued that Title VII's exemption for bona fide seniority systems was intended to cover only those in operation prior to the effective date of the law because Congress referred to the "application" rather than "adoption"

28. *California Brewers Ass'n v. Bryant*, 585 F.2d 421 (9th Cir. 1978), vacated and remanded, 444 U.S. 598 (1980).

29. *Id.*, 444 U.S. at 609.

30. 634 F.2d 744 (4th Cir. 1980), vacated and remanded, 102 S. Ct. 1534 (1982).

31. *Id.*, 634 F.2d at 749.

of such systems.³² Justice Stevens, in a separate dissent, argued that post-Act seniority systems should be subject to the same antidiscrimination standards that apply to hiring, promotion, discharge, and compensation practices, reasoning that such systems cannot be considered bona fide if they have a disparate impact and are not justified by a legitimate business purpose.³³ But the majority was not persuaded that Title VII's immunity from disparate impact suits applies only to seniority systems adopted before the effective date of the Act.

In another 1982 decision, *Pullman-Standard v. Swint*, the Supreme Court admonished the Fifth Circuit Court of Appeals for substituting its judgment for that of the trial court in determining whether a seniority system was bona fide.³⁴ The trial court had found no discriminatory intent in connection with the challenged seniority system, but the appellate court reasoned that the contested system was grounded in intentional racial discrimination, precluding Title VII immunity as a bona fide seniority system. Vacating this decision, the Supreme Court noted that a finding of intentional discrimination is subject to the "clearly erroneous" standard of civil procedure (Rule 52).³⁵ The majority held that the appellate court's assessment of intentional discrimination based on the evidence was a finding of fact to be made by the trial court and not a question of law or mixed question of fact and law permitting independent assessment by the appeals court.

Justice Marshall, dissenting, asserted that the appellate court's action was consistent with the clearly erroneous standard, noting that the court declared its "definite and firm conviction that a mistake has been made."³⁶ Moreover, he reasoned that while appeals courts have been especially reluctant to resolve factual issues which depend on the credibility of the testimony of witnesses, such deference is not required where the lower court's findings of fact are entirely based on documentary evidence. He contended that the appeals court followed well established legal principles in concluding that it was "crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter."³⁷ However, the Court majority was not convinced that the appeals court applied proper standards of appellate review.

32. *Id.*, 102 S. Ct. at 1543 (Brennan, J., dissenting). Justices Marshall and Blackmun joined in the dissent.

33. *Id.* at 1547-1549 (Stevens, J., dissenting).

34. 624 F.2d 525 (5th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 1781 (1982). See also *Terrell v. United States Pipe & Foundry Co.*, 90 FEP Cases 1515 (5th Cir. 1983).

35. FED. R. CIV. P. 52.

36. 102 S. Ct. at 1793 (Marshall, J., dissenting), *quoting* 624 F.2d at 533.

37. *Id.* at 1798, *quoting* 624 F.2d at 532.

Although courts seem increasingly inclined to give deference to negotiated collective bargaining agreements in concluding that challenged seniority systems are bona fide, it is not impossible for plaintiffs to establish that the operation of a seniority system violates Title VII. For example, in 1982 the Seventh Circuit Court of Appeals found that a union negotiated and maintained a seniority system with the intent and effect of having a disparate impact on black workers.³⁸ The bargained seniority system made it difficult for minorities to transfer into a specific bargaining unit and to obtain certain jobs. Evidence indicated that whites transferred into positions within the unit with full carry-over seniority, while blacks were discouraged from doing so. Based on its finding of discriminatory intent, the appeals court ruled that the seniority system could not be considered bona fide under Title VII.

AFFIRMATIVE ACTION PLANS

The adverse impact of seniority systems on victims of prior discriminatory employment practices has not been the only source of controversy. Title VII claims also have arisen in a number of cases involving modifications in seniority systems to give preference to women and minorities in eligibility for promotion and other job benefits or in protection from layoffs. Such affirmative action plans, similar to awards of retroactive seniority, have an impact on the competitive status of employees. However, in contrast to seniority adjustments for individual discrimination victims, class preferential treatment benefits certain class members who have not personally suffered discrimination. In some instances affirmative action plans have been developed because of a judicial finding of prior intentional discrimination in hiring and other personnel practices. In other situations employers have voluntarily entered into collective bargaining agreements that call for preferential treatment to compensate for past discriminatory acts, even though the prior acts have not resulted in legal liability. Such preferential treatment has been challenged as impairing vested seniority rights of other employees.

In a significant 1979 case, *United Steelworkers of America v. Weber*, the Supreme Court held that a company's preferential treatment of minorities did not abridge Title VII even though it modified the use of seniority in awarding job opportunities. The Kaiser Aluminum and Chemical Corporation had entered into a collective bargaining agreement with the union which included an affirmative action plan

38. *Wattleton v. International Bhd. of Boilermakers*, 686 F.2d 586 (7th Cir. 1982).

stipulating that half of the opening in plant craft training programs would be reserved for black employees until the percentage of black craft workers in the plant approximated the percentage of blacks in the local labor market.³⁹ The federal district court held that the affirmative action plan violated Title VII, and the Seventh Circuit Court of Appeals affirmed, reasoning that all employment preferences based upon race (including those preferences incidental to bona fide affirmative action plans) violate Title VII's prohibition against racial discrimination in employment. Disagreeing, the Supreme Court held that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans to correct a racial imbalance in traditionally segregated jobs. Although Title VII stipulates that nothing contained in the law shall be interpreted to "require" employers to grant preferential treatment based on race to remedy a de facto racial imbalance among employees, the Court concluded that if Congress had intended to *prohibit* all race-conscious affirmative action, it would have substituted the phrase "require or permit" for the word "require."⁴⁰

While not defining precisely the line of demarcation between permissible and impermissible affirmative action plans, the Court ruled that the challenged Kaiser plan was on the permissible side of the line. The purposes of the plan mirrored those of the statute and did not unnecessarily "trammel" the interests of white employees. It neither required the discharge of white workers and their replacement with new black hires, nor created an absolute bar to the advancement of white employees because half of those trained in the program would be white. Moreover, the plan was a temporary measure, not intended to maintain a specific racial balance, but simply to eliminate a manifest racial imbalance.

Subsequently, the Supreme Court declined to review a decision in which the Sixth Circuit Court of Appeals upheld a voluntary affirmative action plan for the Detroit Police Force which allowed black officers to receive promotions to sergeant over white officers with higher numerical standings on the eligibility list.⁴¹ The appeals court concluded

39. 443 U.S. 193 (1979). The previous year the Supreme Court delivered its widely publicized decision invalidating the use of a rigid quota system to guarantee a specific number of minorities in each entering medical school class at the University of California-Davis. The Court found that the separate admissions system for minorities violated Title VI of the Civil Rights Act of 1964 (which bars the exclusion of a person on the basis of race from a program or activity receiving federal funds) because nonminorities were not eligible for the "reserved" slots regardless of their qualifications. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

40. *Id.*, 443 U.S. at 207. See also *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981).

41. *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

that the evidence substantiated prior racial discrimination by the police department which justified the preferential treatment of minorities. The court noted that patterns of discrimination which might not result in legal liability can nonetheless justify a race-conscious remedial plan under Title VII. The court further held that the city was not required to prove that the persons receiving preferential treatment under the affirmative action plan had been individually subjected to discrimination. The court declared:

[A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain....⁴²

Until recently, affirmative action plans usually were confined to hiring and promotion quotas, but provisions addressing personnel layoffs have become increasingly common. Plans that disregard seniority rights to preserve a designated percentage of women and/or minority employees are particularly troublesome because such preferential treatment can result in other employees losing their jobs. Many cases pertaining to preferential layoffs in school districts have focused on desegregation decrees that include employment goals and quotas to remedy constitutional and statutory violations of students' rights. Rights guaranteed by the equal protection clause and Title VI have often been at issue in these cases.⁴³ However, some challenges to the use

42. *Id.*, 608 F.2d at 697. While concluding that the affirmative action plan did not violate Title VI or Title VII, the case was remanded for additional consideration of the constitutional issues. The appeals court identified several criteria for the lower court to use in assessing the constitutionality of the plan including operational need for the plan, evidence of prior discrimination leading to the current racial imbalance, and lack of alternative means to correct the imbalance in the foreseeable future.

43. For example, the First Circuit Court of Appeals upheld an affirmative action plan as part of a desegregation order in the Boston School District. The court reasoned that without the plan, stipulating that minorities must maintain 20 percent of the teaching positions regardless of their seniority, efforts made in remedying intentional discrimination in the school district would be eradicated through layoffs necessitated by declining enrollments. *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982), *cert. denied sub nom. Boston Ass'n of School Adm'rs and Supervisors v. Morgan*, 103 S. Ct. 62 (1982). In contrast, the Sixth Circuit Court of Appeals recently reached an opposite conclusion, reversing a district court's order which imposed a racial quota on the Kalamazoo School District's teaching staff, thereby abrogating seniority and contractual rights of non-minorities. The appeals court held that the district court erred by imposing a quota of

of quotas in reduction in force policies have focused in part on Title VII claims, and courts have rendered conflicting rulings regarding the Title VII rights at stake.

For example, in 1982 a Michigan federal district court rejected federal constitutional and federal and state statutory challenges to a school district's affirmative action plan designed to maintain a faculty racial composition roughly approximating that of the student body.⁴⁴ Although the Title VII charge was dismissed for jurisdictional reasons (because the plaintiffs had not obtained a notice of right-to-sue from EEOC), the court noted that Title VII does not require a judicial finding of intentional discrimination before an employer can institute an affirmative action plan. The court concluded that the historical "chronic and substantial" underrepresentation of black teachers in the district justified the temporary imposition of racial quotas in reducing personnel. The court further reasoned that it was appropriate to compare the percentage of minority teachers to the percentage of minority students in the district rather than to relevant labor force data because minority teachers provide important role models for minority pupils.

The following year, however, a Pennsylvania federal district court relied on Title VII in striking down a school district's use of racial quotas to maintain, not merely achieve, racially balanced school faculties.⁴⁵ The court reasoned that racial quotas may be necessary under certain circumstances to *attain* racially balanced staffs, but permanent quotas to *preserve* existing racial percentages constitute discrimination under Title VII. The court distinguished the imposition of a quota to remedy a racial imbalance, such as the plan upheld in *Weber*, from a quota used to maintain a specific racial composition. In the latter instances, the court held that nondiscriminatory alternatives must be pursued.

Several years earlier a California federal district court found that the San Francisco School Board's resolution, requiring the attainment of a specified percentage of minority administrators, meant that virtually

minority teachers (20%) that must be maintained, reasoning that "the record does not demonstrate that nullification of the seniority and tenure rights of white teachers is necessary to vindicate the students' constitutional rights." *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 764 (6th Cir. 1983). In May, 1983, the Boston Teachers Union petitioned the Supreme Court a second time to strike down the Boston School District's racially-based layoff system because of the similarity between the Kalamazoo and Boston cases, *Education Daily*, May 25, 1983, at 5. For a discussion of constitutional and Title VI issues involved in controversies over preferential treatment provisions, see Monique Clague's chapter in this book.

44. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D. Mich. 1982).

45. *Knornick v. School Dist. of Philadelphia*, 555 F. Supp. 249 (E.D. Pa. 1983). See also *Bacica v. Board of Educ. of the School Dist. of the City of Erie*, 451 F. Supp. 882 (W.D. Pa. 1978).

all administrative layoffs would be nonminorities and appointments would be minorities.⁴⁶ The court concluded that the resolution was not justified because there was no evidence of past discrimination in hiring administrators; indeed, several steps had been taken to increase the number of minority administrators. The resolution which foreclosed employment to nonminorities was found in violation of Title VII and the equal protection clause. In subsequent cases, however, the Ninth Circuit Court of Appeals has ruled that a finding of unconstitutional discrimination is not required before employers can impose quotas to protect minorities from layoffs. In 1981 the appeals court held that Title VII does not bar negotiated affirmative action plans that disregard seniority rights, reasoning that "seniority is merely an economic right which the unions may elect to bargain away."⁴⁷

Mixed messages have been even emanated from a single court. For example, in 1976 the Second Circuit Court of Appeals struck down the use of racial quotas in the New York City School District's personnel reduction policy.⁴⁸ The lower court had ordered the school district to maintain designated percentages of black and Puerto Rican supervisory personnel, resulting in whites with greater seniority being released. Reversing the order, the appeals court held that "the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically prescribed" by Title VII.⁴⁹ The court found that a facially neutral excessing plan, operating on the concept of "last hired — first fired," would not unlawfully discriminate against minorities who are disproportionately affected. The court contrasted the permissible use of quotas in hiring practices to remedy past discrimination from the impermissible use of quotas in excessing practices that disregard a neutrally applied seniority system. The court reasoned that while the imposition of layoff quotas abridges Title VII, constructive seniority for specific employees may be an appropriate award with evidence that the individuals have been victims of hiring discrimination.

In 1983, however, the same court ruled that Title VII's immunity for seniority systems that are established and maintained without discriminatory intent does not preclude the federal judiciary from ordering modifications in the application of seniority rights to

46. *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.C. Cal. 1972).

47. *Tangren v. Wackenhut Services*, 658 F.2d 705, 707 (9th Cir. 1981). See also *Zaslowsky v. Board of Educ. of Los Angeles*, 610 F.2d 661 (9th Cir. 1979).

48. *Chance v. Board of Examiners and Bd. of Educ. of the City of New York*, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).

49. *Id.*, 534 F.2d at 998. See also *Jersey Central Power and Light Co. v. Local Unions of the Int'l Bhd. of Elec. Workers*, 508 F.2d 687 (3d Cir. 1975).

correct constitutional violations.⁵⁰ The court held that such relief is necessary to remedy unconstitutional discrimination such as maintenance of a segregated school system. The appeals court concluded that the district court had not abused its discretion in imposing hiring and layoff quotas in the Buffalo School District to guarantee that the existing ratio of minority to majority teachers would be maintained. But the part of the lower court's order calling for racial quotas in recalling excessed teachers was reversed.

In a recent case the First Circuit Court of Appeals declared that remedial efforts to overcome the effects of past discrimination need not be color-blind and neither *Teamsters* nor *American Tobacco* preclude a court "in a litigated discrimination case to ensure that relief already ordered [is] not . . . eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted."⁵¹ Accordingly, the court held that the Title VII entitlement to relief for prior discriminatory practices prevails over the Massachusetts civil service law requiring layoffs in reverse seniority order. The appeals court reasoned that under the court order, prohibiting the Boston Police and Fire Departments from reducing the current level of minority representation, staff reductions were intended to operate within the seniority law, with modifications "to the extent necessary to preserve the integration already achieved."⁵² Recognizing the significant difference between hiring and promotion quotas and a racial ratio insulating minorities from layoffs (because in the latter situations nonminorities with greater seniority lose their jobs), the court nonetheless endorsed the preferential staff reduction plan. The court concluded that an award of retroactive seniority to individual minority employees would not be an appropriate remedy because the racial imbalance of the department rather than individual relief was at issue. Finding the court-ordered percentage of minorities that must be maintained in the department to be "reasonable," the court noted that it was justified by a "compelling need" for racially balanced fire and police departments in a large metropolitan city with a minority population more than double the quota imposed. The court held that "there is nothing magical about seniority, and here common sense suggests that it should be tempered by other entirely rational

50. *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983).

51. Boston chapter, *NAACP v. Beecher*, 679 F.2d 965, 974-975 (1st Cir. 1982), *vacated and remanded*, 103 S. Ct. 2076 (1983) (per curiam). See also *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) in which the appellate court upheld a consent decree preventing the city of Toledo from laying off minority fire fighters. The court noted that "while a bona fide seniority system may not itself violate the law, such a system cannot be allowed to obstruct remedies designed to overcome past discrimination." *Id.* at 564.

52. 679 F.2d at 975.

considerations so that the racial equity achieved at considerable effort in the past decade not be erased."⁵³ The court further declared:

To a minority police officer or fire fighter hired within the last ten years, the imposition of a rigid last hired, first fired seniority system would only mean that once again the dominant white culture had protected its own kind at the expense of blacks and hispanics. If the evil of racial discrimination is to be fought openly, we must not allow ourselves to be caught in a semantic web of aphorisms such as "reverse discrimination" that in the final analysis serve only to perpetuate the discrimination of the past.⁵⁴

The United States Supreme Court agreed to review this case, and the Justice Department submitted a friend-of-the-court brief on behalf of the nonminority plaintiffs, arguing that a seniority system cannot be overturned to protect minorities who were hired under an affirmative action decree. The brief asserted that "there is indeed something very important, if not 'magical', about seniority systems . . . and the rights they grant to employees."⁵⁵ However, in May 1983 the Supreme Court side-stepped the merits of this case, vacating the appellate court's decision and remanding the case for additional consideration because the circumstances surrounding the controversy had changed. In its per curiam order, the Supreme Court noted that Massachusetts had recently enacted legislation providing the city of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, protecting these persons from future layoffs for fiscal reasons, and requiring minimum staffing levels in the departments through June 30, 1983.⁵⁶

Thus, the Title VII rights at stake when seniority provisions are nullified by court-ordered hiring and layoff quotas remain unclear. Some courts have recognized that the imposition of racial quotas which abrogate seniority rights should be strictly scrutinized and upheld only if "necessary" (not merely reasonable) to cure constitutional violations and if the reverse discriminatory effects are not experienced by a small number of "readily identifiable individuals."⁵⁷ Although to date the Supreme Court has declined to address charges of reverse discrimination

53. *Id.* at 978. See also *Association Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Freeze v. Aro, Inc.*, 503 F. Supp. 1045 (E.D. Pa. 1980).

54. *Id.*, 679 F.2d at 978.

55. *Education Daily*, December 21, 1982 at 2.

56. 103 S. Ct. 2076 (1983).

57. See *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983); *Morgan v. O'Bryant*, 671 F.2d 23, 28 (2d Cir. 1982); *Kirkland v. New York State Dep't of Correctional Services*, 520 F.2d 420, 429 (2d Cir. 1975).

in connection with remedial layoff quotas, it seems likely that such claims will increase until the high court clarifies the applicable legal principles.

A controversy involving the implementation and modification of a consent decree embodying an affirmative action plan for Memphis, Tennessee firefighters may provide the vehicle for such clarification because the Supreme Court recently agreed to review the case.⁵⁸ The Sixth Circuit Court of Appeals found that the "reasonable" consent decree endorsed by the federal district court furthers the legitimate interest of assuring equal employment opportunities by imposing hiring and promotion racial quotas. Nonminority firefighters petitioned to intervene, alleging that the decree results in reverse discrimination and that other alternatives are available to remedy past discrimination against minorities without shifting discrimination to nonminorities. The appeals court held that the district court did not abuse its discretion in ruling that the motion to intervene was untimely, noting that the nonminority petitioners had ample opportunities to air their objections to the consent decree before it was adopted.⁵⁹ The appeals court further held that the district court acted appropriately in modifying the decree after an unanticipated deficit in the city's projected budget prompted proposed layoffs. Reasoning that the lower court has "an affirmative duty to protect the integrity of its decree" by "not allowing unexpected events to eradicate the progress made pursuant to an affirmative action plan,"⁶⁰ the appeals court ruled that the trial court acted within its equity jurisdiction in overriding the union's seniority provision and enjoining the city from reducing the percentage of minorities in certain job categories. The appeals court found that the implementation and modification of the consent decree did not compromise any "legally protected interest" of nonminorities, rejecting the reverse discrimination charges as "impermissible collateral attacks."⁶¹ The court further noted that nonminorities had benefited from practices that brought on the consent decree. Substantial attention is focused on this case in hopes that the Supreme Court will clarify the legality of affirmative action plans that alter the operation of bona fide seniority systems.

58. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), cert. granted, 103 S. Ct. 2451 (1983).

59. *Id.* at 549. See *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982), cert. denied, 103 S. Ct. 297 (1983).

60. 679 F.2d at 557, 560. Recognizing the sensitive nature of racial ratios, the court noted that there should be a relationship between the magnitude of the imbalance and the "strength of the goals." The court reasoned that racial ratios are "particularly appropriate where the racial imbalance is highly disproportionate." *Id.* at 553.

61. *Id.* at 558.

CONCLUSION

Title VII litigation involving seniority rights seems destined to continue with the legal issues becoming increasingly complex. While the federal judiciary has ordered the award of retroactive seniority to victims of post-Title VII discrimination in hiring and promotion practices, such relief has been triggered by discriminatory acts apart from the adoption or application of a seniority system. For example, seniority adjustments have been awarded to victims of the post-Act practice of conditioning employment eligibility on the results of a test that has not been validated as job-related.

Plaintiffs have not been as successful in claims that the operation of a seniority system *per se* violates Title VII because of its disparate impact on minorities or women. The Supreme Court has rendered several recent decisions making it more difficult to individuals to challenge the adverse effects of neutrally applied seniority systems. Both pre- and post-Title VII seniority systems that are established and maintained without unlawful motives have been upheld, even though the systems perpetuate the effects of prior discrimination. In short, Title VII's immunity for "bona fide" seniority systems immunizes *all* systems from disparate impact suits because lawful intent has been interpreted as the essence of bona fide status.

More controversial than claims of discrimination in the application of seniority provisions are claims of "reverse discrimination" in connection with modifications in seniority systems to give preference to minorities and/or women, particularly in connection with staff reduction practices. Sensitive questions have been raised regarding the extent that class preferential treatment is *required* to compensate for past intentional discrimination and the extent that it is *allowed* to correct a racial or gender imbalance in the absence of prior unconstitutional acts. Is such class preferential treatment justified because individual relief for discrimination victims (*e.g.*, retroactive seniority, back pay) is not sufficient to eradicate traditional patterns of employment discrimination? Is it appropriate for white males to suffer some present disadvantages (even though they personally are not guilty of discriminatory practices) because members of their class have enjoyed past advantages accruing from the discriminatory treatment of women and minorities? What constitutes a "compelling need" to justify protecting women and minorities from layoffs?

Courts have not answered these questions in unison. In several cases, courts have concluded that temporary hiring, promotion and layoff quotas are required to compensate for prior class discrimination although the individuals benefited may not have suffered discrimination

themselves. Even in some situations where no legal liability exists, some courts have reasoned that Title VII allows employers to negotiate affirmative action plans that modify seniority systems to protect women and/or minorities if there is evidence of a sufficient statistical disparity in the composition of the work force.⁶² However, other courts have reasoned that Title VII allows such preferential treatment only to attain, but not to maintain, a racial or gender balance. Until the United States Supreme Court clarifies the legal status of court-ordered and voluntary affirmative action plans that alter the operation of bona fide seniority systems, it seems likely that individuals displaced in the seniority hierarchy by such plans will continue to assert that they have Title VII rights at stake.

62. See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Detroit Police Officers v. Young*, 608 F.2d 671, 694-698 (6th Cir. 1979).